1995

# The State of Utah v.Jesse Marie Martinez : Brief of Appellant

Utah Court of Appeals


Jan Graham; Attorney General; Attorney for Appellee.
Richard G. Uday; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, | ) | |
| | ) | |
| Plaintiff/Appellee, | ) | |
| | ) | Case No. 950759-CA |
| v. | ) | |
| | ) | |
| JESSE MARIE MARTINEZ, | ) | Priority No. 2 |
| | ) | |
| Defendant/Appellant, | ) | **Oral Argument Requested** |

# BRIEF OF APPELLANT

Appeal from Judgment and Conviction to the Utah State Prison and Sentence for one count of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302, in the Second Judicial District in and for Davis County, the Honorable Jon M. Memmott presiding.

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES. . . . . .2

STATEMENT OF JURISDICTION . . . . . .4

STATEMENT OF ISSUES / STANDARDS OF REVIEW . . . . . .4

DETERMINATIVE AUTHORITY . . . . . .7

STATEMENT OF THE CASE . . . . . 8

STATEMENT OF FACTS . . . . . .9

SUMMARY OF ARGUMENTS . . . . . .14

ARGUMENTS. . . . . .17

CONCLUSION. . . . . 29

STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION . 29

ADDENDUM . . . . . .32

## TABLE OF AUTHORITIES

### CASES CITED

Page(s)

*Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972).....17

*Hicklin v. State*, 535 P.2d 743 (Wyo. 1975).....25

*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938).....17

*Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967).....17

*Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209 (1967).....17

*State v. Archambeau*, 820 P.2d 920 (Utah App. 1991).....8,18,19

*State v. Caserez*, 656 P.2d 1005 (Utah 1982).....17

*State v. Eldredge*, 773 P.2d 29 (Utah), *cert. denied*, 493 U.S. 814, 110 S.Ct. 62 (1989).....18,19

*State v. Frampton*, 737 P.2d 183 (Utah 1987).....17

*State v. Gentlewind*, 844 P.2d 372 (Utah App. 1992).....24

*State v. Gerrard*, 584 P.2d 885 (Utah 1978).....8,24,25

*State v. Gibbons*, 740 P.2d 1309 (Utah 1987), *on subsequent appeal*, 779 P.2d 1133 (Utah 1989).....8

*State v. Gibbons*, 779 P.2d 1133 (Utah 1989).....8,25

*State v. Gray*, 601 P.2d 918 (Utah 1979).....17

*State v. Hamilton*, 732 P.2d 505 (Utah 1986) (per curiam)..17,20

*State v. Jennings*, 875 P.2d 566 (Utah App. 1994).....18

*State v. Mabe*, 864 P.2d 890 (Utah 1993).....7

*State v. Pena*, 869 P.2d 932 (Utah 1994).....7

*State v. Rhodes*, 818 P.2d 1048 (Utah App. 1991).....24

*State v. Richardson*, 843 P.2d 517 (Utah App. 1992).....7

*State v. Shelby*, 728 P.2d 987 (Utah 1986).....8

*State v. Thurman*, 846 P.2d 1256 (Utah 1993).....7

*State v. Ruple*, 631 P.2d 874 (Utah 1981).....17

*State v. Verde*, 770 P.2d 116 (Utah 1989).....19

*State v. Wilson*, 563 P.2d 792 (Utah 1977).....18

*Townsend v. Burke*, 334 U.S. 756, 68 S.Ct. 1252 (1948).....17

*United States v. Daniels*, 558 F.2d 122 (2nd Cir. 1977).....25

*Williams v. State*, 600 So.2d 524 (Fla. Ct. App. 1992).....26

## STATUTES CITED

Utah Code Ann. § 76-3-404(1)(b)(ii).....27

Utah Code Ann. § 76-6-301(1).....9,10

Utah Code Ann. § 76-5-302(1)(b)(c).....9,10

Utah Code Ann. § 58-37-8(2)(a)(I).....9,10

Utah Code Ann. § 77-1-6(1)(a).....17

Utah Code Ann. § 77-18-1(6)(a).....22,27

Utah Code Ann. § 78-2-2(3)(I).....7

Utah Code Ann. § 78-2a-3(2)(k).....7

## COURT RULES CITED

Utah R. Crim. P. 19(c).....19

Utah R. of Evid. 103(d).....21

## STATEMENT OF JURISDICTION

The Utah Supreme Court initially had jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i). However, on October 27, 1995, the Utah Supreme Court "poured-over" the appeal to the Utah Court of Appeals, impliedly pursuant to Utah Code Ann. § 78-2a-

3(2)(k). The Utah Court of Appeals has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k).

## STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the trial court, after granting appointed trial counsel's Motion to Withdraw, erred by failing to appoint counsel to represent Defendant during the May 23, 1995, Sentencing Hearing. The trial court's failure to appoint counsel is a legal determination, based on constitutional and legal principles, and therefore is reviewed for correction of error. *Cf. State v. Pena*, 869 P.2d 932, 940-41 (Utah 1994) (whether a defendant validly waived his or her *Miranda* rights is a question of law reviewed for correct of error); *State v. Richardson*, 843 P.2d 517, 518 (Utah App. 1992) (trial court's interpretation of binding case law presents question of law that is reviewed for correctness); *State v. Thurman*, 846 P.2d 1256, 1270-71 & n.11 (Utah 1993) (trial court's determination of whether consent to search is voluntary is question of law that is reviewed for correction of error); *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993) (ultimate legal determination of whether a confession is voluntary is conclusion of law, which is reviewed for correctness).

This issue was not raised before the trial court. However, this case presents exceptional circumstances and/or circumstances

constituting plain error. *See State v. Archambeau*, 820 P.2d 920, 922-23 (Utah App. 1991); *State v. Gibbons*, 740 P.2d 1309, 1311 (Utah 1987), *on subsequent appeal*, 779 P.2d 1133 (Utah 1989).

2. Whether the trial court abused its discretion in the course of sentencing Defendant. As set forth in *State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989), "An appellate court will set aside a sentence imposed by the trial court" (1) "if the sentence represents an abuse of discretion, *see State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)"; (2) "if the trial judge fails to consider all legally relevant factors, *see State v. Holland*, 777 P.2d 1019, (Utah 1989)"; or (3) "if the sentence imposed exceeds the limits prescribed by law. *State v. Shelby*, 728 P.2d 987, 988 (Utah 1986)." This issue was preserved in the trial court by trial counsel's request that the trial court utilize the option of an inpatient treatment program or halfway house rather than incarceration (R. 64-66, Transcript of July 25, 1995, Sentencing Hearing).

## DETERMINATIVE AUTHORITY

U.S. Const. amend VI.....14

Utah Const. art. I, § 12.....14

*See* case law cited above.....*in passim*

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief.

## STATEMENT OF THE CASE

By information, Defendant, Jesse Marie Martinez, was charged with Aggravated Robbery, a First Degree Felony, in violation of Utah Code Ann. § 76-6-301(1), Aggravated Kidnaping, a First Degree Felony, in violation of Utah Code Ann. § 76-5-302(1)(b)(c), and Possession of a Controlled Substance, a Felony of the Third Degree, in violation of Utah Code Ann. § 58-37-8(2)(a)(I). On February 24, 1995, the Honorable Michael G. Allphin, Second Circuit Court, bound Defendant over to the district court.

On March 21, 1995, Defendant appeared before the district court for arraignment and pleaded not guilty. Thereafter, on April 11, 1995, Defendant appeared with appointed trial counsel, Mr. William J. Albright, for Pretrial Hearing before the district court and entered a guilty plea to only Aggravated Robbery, a First Degree Felony pursuant to plea negotiation. In accordance with the plea negotiation, all other charges were dismissed.

On May 23, 1995, Defendant appeared with appointed trial counsel for Sentencing. During the Sentencing Hearing, Defendant's appointed

trial counsel, Mr. Albright, interrupted and informed the trial court that Defendant had filed a bar complaint against him. Defendant's counsel then made a "formal motion" to withdraw as Defendant's counsel. The trial court granted the motion to withdraw and informed Defendant that "this is the time set for sentencing" and, as part of the sentencing, then "sentenced Defendant to the Department of Corrections for a 60-day evaluation.

On July 25, 1995, Defendant appeared with new appointed counsel, Mr. Don S. Redd, for another sentencing hearing, at which time the trial court sentenced Defendant to an indeterminate term of five years to life at the Utah State Prison,a fine of $1250.00, plus an 85% surcharge. The trial court's Sentence was entered on July 26, 1995, and Judgment was entered on August 16, 1995. Defendant filed Notice of Appeal on August 25, 1995.

## STATEMENT OF FACTS

1. On February 8, 1995, Defendant and E.M. went to the apartment of Russell Young to collect monies claimed to have been owed to them (R. 41, lines 11-15, Transcript of April 11, 1995, Pretrial Hearing);

2. When Mr. Young indicated that he did not have the money, Defendant and E.M. demanded the money again, and, in the process,

Mr. Young saw a gun that was in Defendant's pocket (R. 42, lines 6-8, Transcript of April 11, 1995, Pretrial Hearing);

3. Thereafter, by information, Defendant was charged with Aggravated Robbery, a First Degree Felony, in violation of Utah Code Ann. § 76-6-301(1), Aggravated Kidnaping, a First Degree Felony, in violation of Utah Code Ann. § 76-5-302(1)(b)(c), and Possession of a Controlled Substance, a Felony of the Third Degree, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (R. 10-12, Information);

4. On March 21, 1995, Defendant appeared before the district court for arraignment and pleaded not guilty (R. 13, Minute Entry);

5. Pursuant to a plea negotiation, Defendant, on April 11, 1995, appeared with appointed trial counsel, Mr. William J. Albright, for Pretrial Hearing before the district court and entered a guilty plea to only Aggravated Robbery, a First Degree Felony. All other charges were dismissed (R. 36-45, Transcript of April 11, 1995, Pretrial Hearing);

6. On May 23, 1995, Defendant appeared with appointed trial counsel for Sentencing (R. 46, Transcript of May 23, 1995, Sentencing Hearing);

7. At the Sentencing Hearing on May 23, 1995, the following exchange took place:

**MR. ALBRIGHT**: Your honor, if I may.

**THE COURT:** Let me tell you what I'm willing to do in this case. Having reviewed this, send her down to diagnostic and have an evaluation before commitment to the prison to determine if that's appropriate or if there's other programs.

**MR. ALBRIGHT:** Your honor, before we go further, in talking with Miss Martinez, she has informed me that she has filed a complaint at the bar against myself. Based on that, I cannot represent her. Obviously that's a conflict. Mr. Cella represents the co-defendant in this matter and so is unable to handle the sentencing as well. I've talked with Mel Wilson today and Don Redd is the attorney that will now handle conflict cases. So we need her --.

**THE COURT:** But I'm not going to release her today. I'm not going to release her while we wait.

**MR. ALBRIGHT:** *I can't represent her and I'm not representing her at this time.* As I said, she just let me know today after we took the break. So -- and I have given her copies of the report. She has it in her possession right now. And for the record, also today was the first time that she informed me that she wanted to change her plea. And as I put on the record earlier, I notified her that she did miss the 30 days. That she had missed the 30 days today. I've not received any phone messages from Miss Martinez since April when we were here and today's the first time I've had that information given to me. *So my feeling is that Don Redd needs to be informed that he's going to be representing her* and she needs to take the presentence report that she has or he needs to acquire one before she is sentenced.

*I make a formal motion at this time to withdraw from the case on the conflict that I have on the record.*

**THE COURT:** Okay, *the court will grant your motion.*

**MS. MARTINEZ:** I did try calling him. He did call me back collect. And I did call him back again and left

a message. I told him, please call me. Please do not call me back collect. He never did call me back.

**MR. ALBRIGHT:** That was another matter. She didn't bring up anything about the appeal. That involved -- she didn't want to come to court for sentencing. She wanted a continuance. Is that right?

**MS. MARTINEZ:** Yes. I also didn't -- wanted to speak to you somemore.

**MR. ALBRIGHT:** I didn't talk to her any more [sic]. I talked to your clerk and your clerk had talked to her and told [sic] that she was to come to court. So there was nothing for me to discuss on that subject. She phoned me, as she did state. However, I did talk to her on that day. We did communicate.

**THE COURT:** Ms. Martinez, *this is the time set for sentencing. The recommendation is that you be sentenced to the Utah State Prison five years to life.* I believe that I do need more information and what I'm proposing is *sentence [sic] you to the Department of Corrections for a 60-day evaluation.* In the evaluation they determine your background and make a recommendation if you should -- if I should follow the recommendation or that you should be in some alternative program.

**MS. MARTINEZ:** Do I have to go to jail today?

**THE COURT:** Uh-huh.

**MS. MARTINEZ:** You can't give me a couple of days to get things straightened out with my children, get things put away?

**THE COURT:** No, and the circumstances I'm concerned about, whether you'd be there --.

**MS. MARTINEZ:** I also have -- my mother is also dying. They don't give her very much time to live. I'll be back. I'll do my time. I know I did a crime.

**THE COURT:** Well, I'm really concerned about potential risk of not being there, given the circumstances and therefore, I'm going to order you --.

**MR. CAMPAS:** You Honor --

**THE COURT:** State you name.

**MR. CAMPAS:** Edward Campas. I'm her brother. And your Honor, I'm the one who told her to file the grievance against Mr. Albright because he has been prejudiced against this. He has asked -- she has asked him not to represent her.

**MR. ALBRIGHT:** Then she went ahead and had me represent her. I object to him bringing anything up that's not been filed with the court at this time. The court has nothing to do with that.

**THE COURT:** If you want to address the issue of sentencing, that's the issue.

**MR. CAMPAS:** I will guarantee she'll come back.

**THE COURT:** Well, if she comes back you are going to have I think circumstances. . . .

(R. 46-51, Transcript of May 23, 1995, Sentencing Hearing) (Emphasis Added);

8. That same day, the trial court signed an Order for 60 Day Evaluation, which states in relevant part:

> *This matter came before the Court for pronouncement of sentence on May 23, 1995.* Plaintiff appeared by through Carvel R. Harward, county Attorney for Davis County. *Defendant appeared in person and by his attorney, Don Redd* [sic]. . . .
>
> *There being no legal reason presented to the Court why judgment should not be pronounced,*

> *and it appearing to the Court that imprisonment may be appropriate in this case*, but more detailed information is desirable as a basis for determining the *final sentence*, than has been provided by a presentence report. . . .

(R. 22, Order for 60 Day Evaluation) (Emphasis Added). Contrary to the trial court's Order, Defendant initially appeared at the Sentencing Hearing on May 23, 1995, with appointed trial counsel, William J. Albright, and then, after the trial court granted appointed counsel's Motion to Withdraw, Defendant appeared pro se for the remainder of the Sentencing Hearing (R. 46-50, Transcript of May 23, 1995, Sentencing Hearing). Defendant did not appear and was not represented by subsequently appointed trial counsel, Mr. Don S. Redd, until the second Sentencing Hearing on July 25, 1995 (R. 63-64, Transcript of July 25, 1995, Sentencing Hearing; R. 24, Minute Entry);

9. On July 25, 1995, Defendant appeared with subsequently appointed trial counsel, Mr. Don S. Redd, at the second Sentencing Hearing (R. 63-64, Transcript of July 25, 1995, Sentencing Hearing; R. 24, Minute Entry). At the hearing, counsel informed the trial court that, in the course of the evaluation, applications had been made by the Division of Corrections on behalf of Defendant to various programs to assist Defendant with alcohol and drug abuse (R. 64-65, Transcript of July 25, 1995, Sentencing Hearing). In the process,

counsel advised the trial court that the Parkview treatment facility had accepted Defendant into the an inpatient treatment program, which would allow the court to maintain supervision over Defendant (R. 64-65, Transcript of July 25, 1995, Sentencing Hearing). In addition, trial counsel informed the trial court of the discrepancy concerning whether Defendant had pulled and pointed the gun on the victim (R. 66-67, Transcript of July 25, 1995, Sentencing Hearing);

10. The trial court sentenced Defendant to the Utah State Prison for an indeterminate period of five years to life; a $1250.00 fine; plus an 85% surcharge (R. 66, lines 2-6, Transcript of July 25, 1995, Sentencing Hearing);

11. The trial court's Sentence was entered on July 26, 1995 (R. 25-26, Sentence);

12. The trial court signed its Judgment on August 10, 1995, which was entered on August 16, 1995 (R. 29-31, Judgment);

13. Defendant filed Notice of Appeal on August 25, 1995 (R. 32, Notice of Appeal).

## SUMMARY OF ARGUMENTS

1. The trial court violated Defendant's constitutional right to the effective assistance of counsel by failing to appoint new counsel to represent Defendant during the remainder of the Sentencing

Hearing on May 23, 1995, a critical stage in the criminal proceedings. By so doing, the trial court required Defendant to involuntarily appear pro se during the Sentencing Hearing. Because of the trial court's failure to appoint new counsel, Defendant was deprived of her constitutional right to an advocate who could have marshaled commendations and arguments in mitigation of the impending sentence that was imposed. Finally, the trial court's failure to appoint new counsel casts doubt of the procedural fairness and the public's sense of fair play that is to be provided to all criminal defendants in criminal proceedings.

This issue is raised for the first time on appeal. However, the underlying circumstances of the issue constitute plain error and/or exceptional circumstances.

2. The trial court abused its discretion in the course of sentencing Defendant by its manifestly and inherently unfair conduct of failing to appoint new counsel to represent during the remainder of the Sentencing Hearing on May 23, 1995. In addition, the trial court, in the course of sentencing Defendant, failed to consider legally relevant factors and failed to resolve discrepancies in the Presentence Investigation Report.

## ARGUMENTS

**1. THE TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO APPOINT NEW COUNSEL TO REPRESENT DEFENDANT DURING THE MAY 23, 1995, SENTENCING HEARING, AND THEREBY REQUIRING DEFENDANT TO INVOLUNTARILY APPEAR PRO SE AT THE SENTENCING HEARING.**

As a matter of well-settled law, "[a] defendant in a criminal proceeding has a constitutional right to the assistance of counsel at all critical stages of the prosecution." U.S. Const. amend. VI; [1] Utah Const. art. I, § 12;[2] Utah Code Ann. § 77-1-6(1)(a);[3] *State v. Hamilton*, 732 P.2d 505, 506-07 (Utah 1986) (per curiam); *State v. Gray*, 601 P.2d 918 (Utah 1979). "Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel." *State v. Caserez*, 656 P.2d 1005, 1007 (Utah 1982) (citing *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209 (1967); and *Townsend v. Burke*, 334 U.S. 756, 68 S.Ct. 1252 (1948)). The right to assistance of counsel "is personal in nature and may be waived by a

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[1]The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defence."

[2]Article I, § 12 of the Utah Constitution provides: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . ."

[3]Utah Code Ann. § 77-1-6(1)(a) provides: "In criminal prosecutions the defendant is entitled: To appear in person and defend in person or by counsel."

competent accused [only] *if the waiver is knowingly and intelligently' made."* *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012 (1972); *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023 (1938); *State v. Ruple*, 631 P.2d 874, 875-76 (Utah 1981); *State v. Wilson*, 563 P.2d 792, 793-94 (Utah 1977). A knowing and intelligent waiver is required because "[w]hen an accused manages [her] own defense, [s]he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. Furthermore, the violation of the constitutional right to counsel cannot be considered harmless error. *See State v. Gutierrez*, 864 P.2d 894, 898 n.4 (Utah App. 1993); *State v. Sampson*, 808 P.2d 1100, 1109 (Utah App. 1990), *cert. denied*, 817 P.2d 327 (Utah 1991), *cert. denied*, ___ U.S. ____, 112 S.Ct. 1282 (1992); *Cf. McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless").

This issue of whether the trial court erred in failing to appoint Defendant counsel is raised for the first time on appeal.

Ordinarily, the failure to raise an issue before the trial court precludes consideration of the issue on appeal. *State v. Jennings*, 875 P.2d 566, 570 (Utah App. 1994). There are, however, two limited but well-established exceptions to this general rule. *State v. Archambeau*, 820 P.2d 920, 922 (Utah App. 1991). The appellate court may address an issue for the first time on appeal if the trial court committed plain error or there are exceptional circumstances. *Id.*

In *State v. Eldredge*, 773 P.2d 29 (Utah), *cert. denied*, 493 U.S. 814, 110 S.Ct. 62 (1989), the Utah Supreme Court outlined the following principles involved in determining whether "plain error" exists:

> The first requirement for a finding of plain error is that the error be "plain," i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error . . . . The second and somewhat interrelated requirement for a finding of plain error is that the error affect the substantial rights of the accused, i.e., that the error be harmful.

*Id.* at 35. According to *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989), "in most circumstances, the term 'manifest injustice' [found in Utah R. Crim. P. 19(c)] is synonymous with the 'plain error' standard expressly provided in Utah Rule of Evidence 103(d) and elaborated upon in *Eldredge* . . . ."

The second exception is the catch-all device requiring "exceptional" or unusual" circumstances. *Archambeau*, 820 P.2d at 923. This exception acts as a safety device "to make certain that manifest injustice does not result from the failure to consider an issue on appeal." *Id.*

As to the plain error exception in the instant case, the trial court committed plain error in the course of sentencing Defendant by the obvious failure, once it had granted trial counsel's Motion to Withdraw, to appoint new counsel to represent Defendant during the remainder of the Sentencing Hearing.

Based on the exchange between the trial court, appointed trial counsel, and Defendant, it should have been obvious to the trial court that it was committing error by requiring Defendant to represent herself without first appointing new counsel or obtaining a valid waiver. *See Hamilton*, 732 P.2d at 506-07; *Casarez*, 656 P.2d at 1007. That such an error was plain or obvious is supported by case law, which holds that "sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel." *Casarez*, 656 P.2d at 1007. Secondly, the failure of the trial court to appoint counsel affected the substantial rights of Defendant by depriving Defendant of her constitutional right to the assistance of counsel and thereby

requiring her to involuntarily represent herself in a critical stage of the criminal proceedings.

In addition to the "plain error" exception, the instant case presents exceptional or unusual circumstances. Defendant was not represented by counsel during the May 23, 1995, Sentencing Hearing. Consequently, Defendant, who was pro se litigant, was extremely unfamiliar with the constitutional and procedural requirements with which the trial court should have complied in the course of sentencing. These requirements are of momentous constitutional concern. To not consider and correct this matter on appeal would result in a great and manifest injustice or harm by failing to protect the constitutional right of a litigant who was required, as a resulit of the trial court's failures, to represent herself pro se during the sentencing hearing.

In the instant case, during the Sentencing hearing on May 23, 1995, appointed trial counsel interrupted the trial court at the beginning of the hearing and stated, "I can't represent [Defendant] and I'm not representing her at this time." (R. 47, lines 21-22, Transcript of May 23, 1995, Sentencing Hearing). Trial counsel then made a "formal motion" to withdraw as counsel for Defendant, which the trial court granted (R. 48, lines 12-16, Transcript of May 23, 1995, Sentencing Hearing). Shortly thereafter, the trial court,

without any inquiry as to the appointment of counsel or the knowing and intelligent waiver by Defendant of the constitutional right to counsel, stated, "Ms. Martinez, this is the time set for sentencing. The recommendation is that you be sentenced to the Utah State Prison five years to life. I believe I need more information and what I'm proposing is [to] sentence you to the Department of Corrections for a 60-day evaluation." (R. 49, lines 9-14, Transcript of May 23, 1995, Sentencing Hearing). By so doing, the trial court improperly denied Defendant her constitutional right to counsel when it required her to proceed at the sentencing hearing pro se. Because of this failure, Defendant was deprived of her constitutional right to an advocate who could have marshaled commendations and arguments in mitigation of the impending sentence imposed. Such commendations and arguments in mitigation of incarceration include Defendant's total lack of involvement in the juvenile system (*see* Presentence Investigation Report, p. 5[4]), Defendant's relatively recent involvement in the criminal justice system, which also indicates that Defendant does not present a danger to society (*see* Presentence Investigation Report, p.

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[4]During preparation of Appellant's Brief, counsel became aware that the Second District Court Clerk's Office neglected to include the Presentence Investigation Report in the record upon transmittal of the record to the Utah Court of Appeals. Counsel is in the process of supplementing the record. In the interest of expediting the appeal, counsel refers to the Presentence Investigation Report by page number until such time that the Report is transmitted to the Utah Court of Appeals.

6), and collateral comments from sources close to Defendant that she is a "very good mother" with a problem centered around alcohol and drug abuse (*see* Presentence Investigation Report, pp. 10-11). The failure to appoint new counsel also prejudiced Defendant by preventing her, as a pro se criminal litigant, from challenging any discrepancies in the Presentence Investigation Report as she is entitled to pursuant to Utah Code Ann. § 77-18-1(6)(a).

Similarly, in *United States v. Daniels*, 558 F.2d 122 (2nd Cir. 1977), a rift developed between trial counsel and Defendant. *Id.* at 127. At the outset of sentencing, trial counsel informed the court that the defendant did not wish to be represented by counsel at sentencing. *Id.* The defendant confirmed this and asked the trial court to appoint new counsel for sentencing, arguing that he had been deprived of the effective assistance of counsel at trial. *Id.* While the trial court did not specifically relieve counsel, the minutes of the hearing revealed that the parties and the trial court acted as though counsel no longer represented the defendant. *Id.* In the course of vacating the defendant's sentence and remanding for resentencing, the United States Court of Appeals for the Second Circuit emphasized that the defendant, for all practical purposes was acting without counsel at sentencing. The court further stated that the defendant was "prejudiced by the lack of an advocate who could

have marshalled" commendations and made arguments in mitigation of the judgment to be imposed. *Id.* At 128.

In the more recent case of *Williams v. State*, 600 So.2d 524 (Fla. Ct. App. 1992), the defendant moved to dismiss his trial counsel, which the trial court granted. *Id.* at 525. The defendant then requested that new counsel be appointed, which the trial court denied, reasoning that the defendant had already had two attorneys represent him. *Id.* Although the Florida Court of Appeals sympathized with the trial court's "beleaguered" circumstances, it held that the trial court improperly denied the defendant of his constitutional right to counsel when it required him to proceed against his will with the sentencing hearing pro se and remanded the case for resentencing. *Id.* at 525-26.

Like the aforementioned cases of *Daniels* and *Williams*, the trial court, in the instant case, required Defendant to represent herself at the sentencing hearing pro se. The instant case, however, is more egregious inasmuch as Defendant was arguably less knowledgeable and familiar with the procedural requirements and rights she was entitled to than either of the defendants in *Daniels* or *Williams*. Furthermore, the trial court, in the instant case, had a duty when informed of the conflict between trial counsel and Defendant and the subsequent withdrawal of trial counsel, to immediately suspend or

continue the sentencing hearing, without further action, until Defendant was appropriately represented by counsel. The trial court's failure to appoint counsel for the remainder of the May 23, 1995, Sentencing Hearing, casts doubt upon the justice system and the procedural fairness that is to be provided to every defendant in the course of criminal proceedings, especially when, as in this case, fundamental constitutional rights are involved. Because the trial court failed to appoint new counsel and required Defendant to proceed with sentencing pro se, Defendant's sentence should be vacated and the case remanded for resentencing. Finally, the trial court failed in its duty to inquire as to the appointment of new counsel prior to proceeding with the sentencing hearing, and it also failed to continue the sentencing hearing until Defendant was properly represented by new counsel.

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN THE COURSE OF SENTENCING DEFENDANT BECAUSE THE ACTIONS OF THE TRIAL COURT IN SENTENCING DEFENDANT WERE INHERENTLY UNFAIR AND BECAUSE THE TRIAL COURT FAILED TO CONSIDER ALL LEGALLY RELEVANT FACTORS.**

An appellate court "`will set aside a sentence imposed by the trial court if the sentence represents an abuse of discretion, if the trial judge fails to consider all legally relevant factors, or if the sentence imposed exceeds the limits prescribed by law.'" *State v.*

*Gentlewind*, 844 P.2d 372, 375 (Utah App. 1992) (quoting *State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted)). "An abuse of discretion occurs only when it is "`clear that the actions of the judge were . . . *inherently unfair.*'" *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991) (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)).

In addition to the arguments set forth in this section of the Brief, Defendant incorporates the arguments under Defendant's above-mentioned argument concerning the violation of Defendant's constitutional right to the effective assistance of counsel during sentencing. By failing to appoint new counsel for the remainder of the May 23, 1995, Sentencing Hearing, the trial court's actions in the course of sentencing Defendant were inherently unfair. Such conduct on the part of the trial court constitutes "`manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.'" *See Gerrard*, 584 P.2d 885, 887 (Utah 1978) (quoting *Hicklin v. State*, 535 P.2d 743, 751 (Wyo. 1975)).

Further, the record indicates that the trial court failed to consider legally relevant factors in the course of sentencing Defendant. During the second Sentencing Hearing on July 25, 1995, the following exchange took place:

> **THE COURT:** Is there anything you want to present to the Court before I enter sentence in the matter?

**MR. REDD:** Yes, there is. There have been applications made while this evaluation was going on for programs that would be designed to aid Ms. Martinez in making the changes she needs to make in her life. One of those places is Parkview. And it is an inpatient facility. And she informed me this morning that they have accepted her to that program. That's an alternative that I didn't notice in the report. And maybe that information came after the report was prepared. But there is an alternative for the Court to put her in an inpatient facility where she would be responsible and also receive the aid she needs.

And she would be required to remain there. She wouldn't have the option of dropping out because she would be under the Court's control. And it is her desire, and our request therefore, that the Court utilize that option rather than the option recommended by the report of remaining incarcerated.

**THE COURT:** May I just ask, usually Diagnostic checks all those programs. And that's a program they regularly check. And that's not --

**MR. REDD:** Well, they are the ones that made the recommendation -- the application, helped her with the application. It is just that the response of acceptance of her into that program apparently has come back since the report was prepared.

**THE COURT:** Okay. Is there anything else you would like to present to the Court?

**MR. REDD:** She would like to make a statement.

**MS. MARTINEZ:** I would just like to say I would like a chance to go to Parkview and see if I can get my life together there, and get my family back together. And that's about all I have to say.

**THE COURT:** Okay, I think in terms of the report, the recommendation is that they felt that there had to be a long term program. I am not sure -- I am familiar with Parkview. I don't think -- it is not long term,

about two or three months. I don't think it is a long term program. I think the Court feels given the review and the 60 day diagnostic, the Court is going to follow the recommendation of the Department of Corrections. And that is, to the charge of aggravated assault, a felony of the first degree, the Defendant is going to be sentenced to the Utah State Prison for an indeterminate period of five years to life; $1,250.00 fine, plus a surcharge of 85 percent; there will be no firearm enhancement or anything with the sentence in this program.

Now, if you would like to appeal the sentence the Court has entered, you must make the appeal within 30 days.

MR. **REDD:** Your Honor, there is one other item, if I could mention it to the Court.

THE COURT: Okay.

MR. **REDD:** We notice in the report that there is significance applied to the fact that Ms. Martinez does not acknowledge pulling out the gun, pointing it at the victim, and such things as that. And quite a bit of credence is placed on her not making the changes she needs to make by her taking that posture. And we are very concerned about that.

She has adamantly maintained that didn't happen. And the only evidence that I am aware of that is from the victim, who has a record that certainly is more horrendous than hers as far as believability. Yet the people who are working with her seem to insist that she acknowledge conduct that she says she didn't commit. And if that's one of the roadblocks in making the progress they want her to make, I don't know how we get around that.

**THE COURT:** I think it may be well then if you want to write a letter to the program people as her counsel and explain that, and explain the circumstances, it may be appropriate to do that. I think that's the best way to address that.

(R. 65-67, Transcript of July 25, 1995, Sentencing Hearing).

As evidenced by the aforementioned part of the record, the trial court failed to consider and clarify whether the Parkview alternative treatment program met the qualifications for a long term program pursuant to the recommendation and assistance of the Department of Corrections (*see* R. 65, lines 7-12 and 20-24, Transcript of July 25, 1995, Sentencing Hearing). By failing to clarify whether the Parkview treatment facility is a long term program sufficient for the needs of Defendant in the treatment of her alcohol and drug abuse, the trial court failed to consider relevant factors in the course of sentencing Defendant.

Utah Code Ann. § 77-18-1(6)(a) provides, in relevant part:

> Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

Utah Code Ann. § 76-3-404(1)(b)(ii) states that "[a]ny diagnostic evaluation report ordered by the court is supplemental to and becomes a part of the presentence investigation report."

At the Sentencing Hearing on July 25, 1995, Defendant's trial counsel brought to the court's attention the discrepancy concerning

whether or not Defendant actually pulled the gun and pointed it at the victim in the course of the events serving as a basis for the aggravated robbery charge (R. 66-67, Transcript of July 25, 1995, Sentencing Hearing). The trial court failed to resolve this discrepancy in the manner set forth in Utah Code Ann. § 77-18-1(6)(a), which requires the trial court, in the event that the matter cannot be resolved between the parties, to make a determination of relevance and accuracy on the record. Such a determination is critical not only to the sentence imposed but to the remainder of Defendant's involvement with the correctional system, including the Board of Pardons.

## CONCLUSION

Based on the foregoing, Defendant respectfully asks that the Court vacate her sentence and remand the case for resentencing so that Defendant might have the opportunity to be represented by counsel during sentencing and so the trial court might consider all legally relevant factors in the course of imposing sentence.

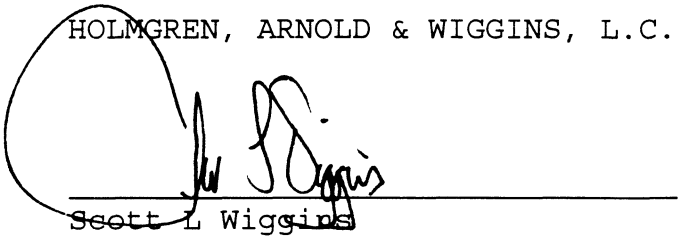
## STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Defendant requests oral argument because oral argument will materially enhance the decisional process due to the significant

issues in the instant appeal dealing with the constitutional right to the assistance of counsel at the critical stage of sentencing, which is a matter of continuing public interest and involves issues requiring further development in the area of criminal law. Counsel for Defendant further requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value in future cases.

RESPECTFULLY SUBMITTED this 20th day of February, 1996.

HOLMGREN, ARNOLD & WIGGINS, L.C.



Scott L Wiggins
Attorneys for Appellant

## CERTIFICATE OF MAILING

I hereby certify that I personally caused to be mailed a true and correct copy of the foregoing **BRIEF OF APPELLANT**, postage prepaid, to the following, on this 20th day of February, 1996.

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